STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7701

Investigation into the Complaint of Mark	)
Tucker concerning Cellco Partnership, d/b/a	)
Verizon Wireless's, INpulse Prepaid Wireless	)
Telephone Service Plan	)

Order entered: 8/26/2011

ORDER DISMISSING COMPLAINT

I. REPORT AND RECOMMENDATION

In this Report, I recommend that the Vermont Public Service Board (the "Board") dismiss the complaint of Mark Tucker and close this investigation because Mr. Tucker lacks standing under 30 V.S.A. § 208 to sue for the declaratory and injunctive relief he is seeking against Cellco Partnership, d/b/a Verizon Wireless ("Verizon Wireless" or the "Company"). I have reached this conclusion after reviewing in the entirety Mr. Tucker's petition,[1] his correspondence with the Board, the transcript of the prehearing conference in this matter, and the briefs filed by Mr. Tucker, the Department of Public Service (the "Department"), and Verizon Wireless in connection with the Company's motion to dismiss Mr. Tucker's complaint.

A. BACKGROUND

On July 14, 2010, Mr. Tucker filed a letter[2] with the Board detailing a complaint regarding his contract with Verizon Wireless for a service offering known as the "INpulse Plan" — a prepaid commercial mobile radio service plan. Toward the end of June of 2010, Mr.

1. Mr. Tucker's petition consists of two letters to the Board, both of which are described in greater detail later in this Report.

2. Hereinafter, this letter is referred to as "Tucker Letter I." It is the first of the two letters that make up Mr. Tucker's petition.

Tucker's INpulse Plan term expired. At that time, he had a balance of approximately $70.00 in his INpulse account. Mr. Tucker chose not to make the additional, minimum deposit to his account that would have been due on June 28, 2010, in order to keep his INpulse service active — Mr. Tucker questioned the "fairness" of being required to make "ongoing regular payments to keep the account open, even when the customer has an adequate balance ($70.00 in my case), and even though (in my case) the minimum deposit amount exceeds the monthly usage for that customer."[3] Mr. Tucker further objected to this additional deposit requirement as inconsistent with the Company's representation to him that "with our INpulse prepaid program, you only pay for your cellular service on the days that you use it."[4] With the deadline having passed for Mr. Tucker to "replenish" his account by depositing additional funds, Verizon Wireless "zeroed out" his $70.00 balance and disconnected his INpulse service.[5]

Based on these allegations, Mr. Tucker requested a hearing before the Board to obtain a ruling "on the validity" of what he describes as the "confiscatory policy" embodied in the Liquidated Damages Clause of the INpulse Plan. Furthermore, in the event of a favorable declaratory judgment from the Board, Mr. Tucker requested an order directing Verizon Wireless to reinstate his INpulse account balance.[6]

On October 25, 2010, the Deputy Clerk of the Board advised Mr. Tucker by letter that the Board's jurisdiction over commercial mobile radio service ("CMRS") is limited by federal law to regulating the "terms and conditions" offered by CMRS providers such as Verizon Wireless, and that his complaint could not be acted upon by the Board because it appeared to concern the "rates" charged by the Company for taking service under the INpulse Plan — a subject matter that is reserved exclusively for federal regulation.[7]

---

3. Tucker Letter I at 2.

4. *Letter from Leslie Simpson on behalf of Verizon Wireless to Mr. Tucker* dated December 23, 2008 (attached to Tucker Letter I).

5. Hereinafter, the "replenishment" and "zero out" provisions of the INpulse Plan will be referred to as the "Liquidated Damages Clause."

6. Tucker Letter I at 2.

7. Docket 7701, Order of 1/13/11 at 1-2 (the "Opening Order").

On November 2, 2010, Mr. Tucker filed a second letter [8] with the Board "to clarify" that his dispute with Verizon Wireless should be viewed as a complaint about the fairness of the "terms and conditions" of the INpulse Plan because he is challenging the consistency of Verizon Wireless's INpulse Plan with the Company's "pay when you use it" advertising. Mr. Tucker stated that

> the plain language meaning of 'Pay only when you use it' is a terms and conditions matter, which is violated by the company's practices of 1) demanding minimum monthly payments regardless of account balance, and 2) confiscation of the customer's account balance when the customer refuses to continue paying more into the account than he (I) am ever likely to use. To date, no one has offered me a logical explanation of why this is a fair and just term and condition of the service."[9]

On January 13, 2011, the Board opened an investigation pursuant to 30 V.S.A. §§ 208 and 209(a)(3) into the complaint of Mr. Tucker against Verizon Wireless, with the caveat that the proceeding initially "will be limited to examining whether the Board has the requisite jurisdiction to consider and grant any relief in regard to Mr. Tucker's complaint."[10]

On January 19, 2011, Verizon Wireless filed a letter with the Board asserting that there was no need to convene a hearing to assess the Board's jurisdiction over Mr. Tucker's claim because, as a matter of state law, the Company's tariff offerings are exempt from Board review and approval. Verizon Wireless further noted that Mr. Tucker's petition had identified neither any statutory violation committed by the Company nor any remedy that the Board was empowered to grant him. Nonetheless, the Company advised that it would send Mr. Tucker a check for $70.00 as a refund to "resolve this dispute as efficiently as possible," and further requested that the Board "close the investigation without the need for further resources to be devoted to this matter."[11]

---

8. Hereinafter, this letter is referred to as "Tucker Letter II." It is the second of the two letters that make up Mr. Tucker's petition.

9. Tucker Letter II at 1.

10. Opening Order at 3.

11. *Letter from Victoria J. Brown, Esq., on behalf of Verizon Wireless, to Susan M. Hudson*, dated January 19, 2011, at 2.

Also on January 19, 2011, Mr. Tucker sent a third letter to the Board in which he stated that he would reject the Company's $70.00 settlement offer. Mr. Tucker explained that "I want the account reinstated because I wish to have cellphone service provided under reasonable terms that reflect the advertised rates; thus payment of the account balance to me does not provide that relief. I believe that settlement of this matter without a hearing of the facts would only allow Verizon Wireless to continue confiscating unused balances from other customers, a practice that on its face is, in my opinion, an unfair term and condition of their contract that will harm other consumers in the State of Vermont."[12]

On February 2, 2011, Verizon Wireless again wrote to the Board to request dismissal of Mr. Tucker's complaint "without the need for a prehearing conference." The Company reiterated its view that its contract terms "are not subject to Board review or approval due to Verizon Wireless' status as a nondominant carrier under 30 V.S.A. § 227c and Board Rule 7.500." Citing Board Rules 7.506(B) and (E)(1), Verizon Wireless asserted that nondominant carriers are exempt from "Vermont utility statutes governing rate schedules and special contracts" because "The Vermont General Assembly and the Public Service Board have determined that competition in the marketplace is sufficient to ensure that the rates, terms and conditions of service are just and reasonable, . . . and afford the public at least as much protection as the applicable regulatory requirements that were suspended or reduced."[13] Accordingly, the Company maintains that "if Mr. Tucker does not like the terms and conditions of service from Verizon Wireless, his remedy lies in the marketplace and not before the Board."

---

12. *Letter from Mark Tucker to Judith C. Whitney,* dated January 19, 2011.

13. *Letter from Victoria J. Brown, Esq., on behalf of Verizon Wireless, to Susan M. Hudson*, dated February 2, 2011, at 2. The Company reference to the state of competition in Vermont reflects the following language from Board Rule 7.502, which states in relevant part:

> In determining what modifications, reductions or suspensions of Title 30 requirements should be included in this rule, the Public Service Board has determined that competition in the relevant markets, combined with the remaining regulatory requirements of Title 30 . . . will be sufficient to ensure that the charges, practices classifications or regulations related to the service are just and reasonable, and . . . will afford the public at least as much protection as the applicable regulatory requirements that are modified, reduced or suspended.

On February 4, 2011, Mr. Tucker filed a letter with the Board asserting that, notwithstanding Verizon Wireless' argument to the contrary, the marketplace "is no real alternative at all, since to the best of my knowledge *all of the cell carriers* doing business in Vermont have essentially similar confiscatory terms and conditions for the prepaid service."[14] Asserting that the Company's INpulse Plan terms were "not clearly described in either the online marketing presentation of the service or in any printed material that was made available to me upon initiation of the service," Mr. Tucker further wrote that "before you order this dismissal I respectfully ask for an alternative forum in which to present my more detailed complaint on this matter." Mr. Tucker then concluded by reiterating his concern that the Liquidated Damages Clause represents "an unfair term and condition of [the Company's] contract that will harm other consumers in the State of Vermont."

On February 15, 2011, a prehearing conference was convened for the purpose of identifying and simplifying the issues in this docket at this stage. At that hearing, Verizon Wireless asserted that the nature of Mr. Tucker's complaint remained unclear and that the Company therefore questioned whether it had received adequate due process notice of the claim asserted against it by Mr. Tucker. After a lengthy discussion on the record, Mr. Tucker agreed that his complaint could be summarized as "a challenge to the alleged unfairness or unreasonableness of the terms of the INpulse Plan contract that allow Verizon Wireless to "zero out" any monetary balance remaining in a customer's account at the end of the contractual term of service unless that customer deposits additional funds."[15]

On March 4, 2011, Verizon Wireless filed a motion to dismiss Mr. Tucker's complaint pursuant to V.R.C.P. 12(b)(6) (failure to state a claim), V.R.C.P. 12(b)(1) and V.R.C.P. 12(h)(3) (lack of subject-matter jurisdiction).[16]

---

14. *Letter from Mark Tucker to Judith C. Whitney,* dated February 4, 2011, at 1 (emphasis in the original).

15. Docket 7701, Order of 2/24/11 at 2 (the "Prehearing Conference Memorandum"). No party has objected to this description of Mr. Tucker's complaint. I further note that after Mr. Tucker's complaint was summarized on the record, Verizon Wireless waived the opportunity to file a motion pursuant to V.R.C.P. 12(e) for a more definite statement. Tr. 2/15/11 at 34 (Phillips).

16. Hereinafter the "Verizon Dismissal Motion."

On March 23, 2011, Mr. Tucker filed a response opposing the Verizon Dismissal Motion.[17]

On March 28, 2011, the Department filed a response to the Verizon Dismissal Motion that expressed support for dismissing Mr. Tucker's complaint.[18]

On April 18, 2011, Verizon Wireless filed a sur-reply to the responses filed by Mr. Tucker and the Department.[19]

B. DISCUSSION

The positions of the parties

In moving to dismiss, the Company first contends that Mr. Tucker's complaint must be dismissed pursuant to V.R.C.P. 12(b)(6) for failure to state a claim because it contains no "showing of an unlawful act; rather he alleges that Verizon Wireless' marketing was misleading."[20] According to the Company, Mr. Tucker "has failed to point to any provision of law that provides a basis for the Board to grant the relief he seeks," and instead has only offered "a series of conclusory claims about Verizon Wireless's INpulse prepaid service, including that its marketing and advertising are misleading, that its contract provisions are unclear, and that the loss of unexpended funds is confiscatory."[21] The Company insists that these "conclusory statements do not demonstrate that Mr. Tucker is entitled to the relief he seeks."[22]

In addition to seeking dismissal pursuant to Rule 12(b)(6), Verizon Wireless argues that dismissal would be appropriate pursuant to V.R.C.P. 12(b)(1) because the Board lacks subject-matter jurisdiction to consider any claim that the Liquidated Damages Clause is "unfair" or "confiscatory" or is inconsistent with how the Company has advertised the INpulse Plan.[23] In support of this argument, Verizon Wireless asserts that pursuant to Board Rule 7.506, "the Board has suspended the requirements of 30 V.S.A. §§ 225, 226, 227(a) and 229, which otherwise give the Board authority over the terms of telecommunications tariffs and contracts of nondominant

17. Hereinafter the "Tucker Reply."
18. Hereinafter the "DPS Reply."
19. Hereinafter the "Verizon Sur-Reply."
20. Verizon Dismissal Motion at 2.
21. Verizon Dismissal Motion at 10-12.
22. *Id*. at 12.
23. Verizon Dismissal Motion at 15.

carriers."[24] Verizon Wireless further points out that "the Board has acted, through Board Rule 7.602, to exempt providers of commercial mobile radio service ('CMRS'), such as Verizon Wireless, from the Board's consumer protection rules."[25] Thus, according to the Company, "the Board lacks subject-matter jurisdiction to hear Mr. Tucker's claims and should dismiss the case under V.R.C.P. 12(b)(1)."[26]

The Department agrees with Verizon Wireless that Mr. Tucker's complaint should be dismissed.[27] According to the Department, dismissal is appropriate under Rule 12(b)(6) because Mr. Tucker has not alleged any violation by Verizon Wireless of a tariff, statute, rule or order of the Board, and therefore has failed to state a claim for which relief could be granted.[28] The Department further agrees that dismissal pursuant to Rule 12(b)(1) would be appropriate because, in promulgating Board Rule 7.600, the Board appears to have suspended its jurisdiction to hear consumer complaints against CMRS carriers that are based on allegations of an unfair trade practice (Board Rule 7.607(A)(2)) or misleading advertising (Board Rule 7.610).[29] Finally, the Department points out that dismissal would not leave Mr. Tucker without a remedy — he could still bring suit in Vermont Superior Court under the Vermont Consumer Fraud Act (9 V.S.A. §§ 2453 and 2461).[30]

In turn, Mr. Tucker counters that he has satisfied the consumer complaint pleading requirement under Board Rule 2.302 of providing "a short and plain statement of facts showing

---

24. Verizon Dismissal Motion at 22.

25. *Id.* Board Rule 7.602 states that the consumer protection provisions of Board Rule 7.600 "do not apply to telecommunications services provided by commercial mobile radio service carriers."

26. *Id.* at 15.

27. The Department's brief also raises and discusses the issue of whether Verizon Wireless, as a CMRS provider, continues to be obliged to provide the Board with a current version of its standard services contract offerings. DPS Reply at 6. In turn, Verizon Wireless maintains that, as a nondominant carrier, it is exempt pursuant to Board Rule 7.506(E) from filing such contracts with the Board. Verizon Sur-Reply at 4-7. As I observed at the prehearing conference, questions concerning this regulatory filing requirement are not germane to Mr. Tucker's complaint. Tr. 2/15/11 at 71. For this reason, I do not recommend that the Board rule on the merits of either party's position on this point at this time. Any uncertainty regarding the obligation of a CMRS provider to file a copy of its standard services contract offerings with the Board when doing business in Vermont should be resolved in a separate proceeding.

28. DPS Reply at 4.

29. *Id.*

30. *Id.*

that the complainant is entitled to relief." He maintains that "the preponderance of language" in his complaint shows that his concern is "with the fairness of a particular contract term . . . " and that his complaint is about more than "simply marketing."[31] Specifically, Mr. Tucker contends that, notwithstanding the Board's finding to the contrary in Board Rule 7.502(A)(1), market competition has failed to protect consumers because "there is apparently no CMRS operating in Vermont that offers an alternative plan that does not act in the manner that I have alleged to be unfair and confiscatory."[32] Finally, Mr. Tucker expresses concern that if the Board were to grant dismissal due to lack of subject-matter jurisdiction as Verizon Wireless has requested, then such a ruling would "be a potential disaster for Vermont consumers, who would then face a CMRS marketplace controlled by a shrinking number of providers who now would feel immune from any regulatory oversight whatsoever."[33] Therefore, Mr. Tucker asks the Board to deny the Verizon Dismissal Motion.

Legal Analysis

As indicated in the Opening Order, the jurisdiction of the Board to act on Mr. Tucker's complaint arises from 30 V.S.A. § 209(a)(3) and § 208. Section 209(a)(3) imposes a duty upon the Board to ensure that the utilities under its supervision operate and conduct their business "so as to be reasonable and expedient, and to promote the safety, convenience and accommodation of the public." This statutory charge necessarily reflects that the utilities subject to the Board's regulatory supervision have a legal obligation to provide service on reasonable terms and conditions. In turn, the legal obligation of utilities operating in Vermont to provide service on reasonable terms is manifest in 30 V.S.A. § 218 and § 219.[34]

The Board adopted Board Rule 7.500 pursuant to its authority under 30 V.S.A. § 227c to "modify, reduce or suspend the requirements under [Title 30] as applied to nondominant

---

31. Tucker Reply at 4 and 15.

32. *Id.* at 10.

33. Tucker Reply at 15.

34. Section 219 of Title 30 states that "[e]ach company subject to supervision under this chapter shall be required to furnish reasonably adequate service, accommodation and facilities to the public." In turn, Section 218(a) of Title 30 authorizes the Board to compel adequate, just and reasonable service by ordering "such changes in any regulation, . . . practices, or acts" of a regulated company whose schedules have been found, upon hearing, to be unreasonable.

providers of telecommunications service."[35] Neither Section 218 nor 219 are among the Title 30 provisions that were modified or suspended by Board Rule 7.500. The decision not to modify or suspend Sections 218 and 219 in regulating nondominant telecommunications carriers is consistent with the Board's determination in Board Rule 7.502(A)(1)-(2) that "competition in the relevant markets, *combined with the remaining regulatory requirements of Title 30* . . . will be sufficient to ensure that the . . . practices, . . . or regulations related to the service are just and reasonable . . . and will afford the public at least as much protection as the applicable regulatory requirements that are modified, reduced or suspended." Sections 218 and 219 represent two examples of "the remaining regulatory requirements of Title 30" that give meaning and effect to this language in Board Rule 7.502(A).

The continued applicability of Sections 218 and 219 in the relaxed regulatory environment created by Rule 7.500 is of heightened significance in the case of CMRS providers who, as Verizon Wireless and the Department have pointed out, are exempt pursuant to Board Rule 7.602 from the consumer protection standards codified in Board Rule 7.600. Among other things, Sections 218 and 219 provide notice to these companies of their legal obligation in Vermont to conduct their business and to provide service on reasonable terms. Furthermore, as was the case before the promulgation of Rule 7.500 in 2006, it remains the Board's policy to review the reasonableness of the conduct and terms of service of CMRS providers on a case-by-case basis.[36]

In this case, the Board elected to review Mr. Tucker's case to determine whether there was a need to exercise its "authority to ensure that Vermont consumers are afforded adequate protections and are served pursuant to reasonable terms and conditions."[37] To this end, the Opening Order identified Mr. Tucker's written claims against Verizon Wireless as "a complaint

35. 30 V.S.A. § 227c(a).

36. *See* Docket 5454, *Re: Regulation of Cellular Telecommunications Services*, Order of 1/8/92 at 57 ("The Board will exercise jurisdiction over billing practices, as a consumer protection matter, as necessary.")

37. Opening Order at 3.

filed pursuant to § 208 alleging that Verizon Wireless has committed an unlawful act that has adversely affected Mr. Tucker."[38]

The Company has vigorously contested the Board's assertion of its authority to review this matter pursuant to Sections 208 and 209(a)(3), insisting that dismissal is required pursuant to V.R.C.P. 12(b)(1) for lack of subject-matter jurisdiction, and V.R.C.P. 12(b)(6) for failure to state a claim. However, before examining the Company's arguments for dismissal pursuant to Rules 12(b)(1) and (6), it is appropriate to examine Mr. Tucker's petition to ascertain whether it satisfies the initial burden of establishing the justiciability of the claim by pleading allegations demonstrating that Mr. Tucker has the requisite standing to bring this action.[39]

In Vermont, legal standing to file a complaint with the Board against a utility subject to regulatory supervision pursuant to Title 30 is governed by statute. In order to have standing to contest the lawfulness of a utility practice, the complainant must be "a company or five or more individuals or, if less than five are so affected, then any one of them."[40] Thus, for purposes of establishing that a complaint arising under Section 208 is justiciable, the petition must contain allegations demonstrating that the complainant — in this case, Mr. Tucker — has the standing needed to sue.[41]

As established at the prehearing conference on February 15, 2011, the gravamen of Mr. Tucker's complaint is the alleged unfairness or unreasonableness of the Liquidated Damages

---

38. Opening Order at 2.

39. Standing is an issue of justiciability that addresses whether a court may grant relief to a party in the *plaintiff's* position. It is distinct from the issue of subject-matter jurisdiction, which addresses whether a court may grant relief to *any* plaintiff given the claim asserted. *Rent Stabilization Assoc. of the City of New York v. Dinkins*, 5 F.3d 591, 594 n.2 (2d Cir. 1993)(citing *Baker v. Carr*, 369 U.S. 186, 198-208 (1968) and *Flast v. Cohen*, 392 U.S. 83, 98-99 (1968)). Both subject-matter jurisdiction and standing (as well as other questions of justiciability, such as ripeness and mootness) operate to limit the power of a court to act on a claim. For this reason, courts generally dismiss for lack of standing pursuant to Rule 12(b)(1), though Rule 12(b)(6) has been used for this purpose as well. *Id*.

40. 30 V.S.A. § 208. The standing requirement embodied in Section 208 is jurisdictional and, therefore, cannot be waived by either the parties or the tribunal. *Cf. Town of Cavendish v. Vermont Public Power Supply Authority*, 141 Vt. 144, 147, 446 A.2d 792, 794 (1982). Also, it should be noted that the term "company" in Section 208 refers to an entity organized to conduct the business of a utility company. *See* 30 V.S.A. § 201(a).

41. The Section 208 standing requirements apply to individuals — such as Mr. Tucker — and utility companies who wish to file a complaint regarding a utility's allegedly unlawful or negligent conduct. Section 208 does not affect the Board's discretion under Section 209 to open an investigation into the practices of a utility subject to its regulatory supervision. Nor does Section 208 in any way constrain the Department in exercising its discretion pursuant to 30 V.S.A. § 2(c) to petition the Board for such an investigation.

Clause in the INpulse Plan.[42] By way of relief, Mr. Tucker is seeking an order directing Verizon Wireless to reinstate his account balance — a remedy that, as Mr. Tucker acknowledges, would further necessitate an order declaring that the Liquidated Damages Clause is void as against public policy and enjoining Verizon Wireless from further application of this provision as a term of service.[43]

Since filing his initial complaint letter, Mr. Tucker has had the benefit of numerous opportunities to supplement and refine his allegations against Verizon Wireless.[44] Specifically, Mr. Tucker has filed several letters with the Board; he has participated in a prehearing conference where the nature of his complaint was discussed at length on the record in order to narrow the issues in the case; and he has filed a brief in opposition to the Verizon Wireless Motion. Having considered all of these communications from Mr. Tucker, it is now apparent that his dispute with Verizon Wireless is not based on any allegations that the Company has applied the Liquidated Damages Clause of the INpulse Plan in an unreasonable manner such that Mr. Tucker is one of fewer than five individuals "so affected." Rather, I perceive that Mr. Tucker objects to the fairness and reasonableness *per se* of the Liquidated Damages Clause, which he contends should be declared void as against public policy.

To his credit, Mr. Tucker has frankly avowed that his purpose in pursuing his complaint — as opposed to accepting Verizon Wireless' offer to refund his $70.00 balance — is to compel Verizon Wireless to desist from "confiscating unused balances from other customers, a practice that on its face is, in my opinion, an unfair term and condition of their contract that will harm other consumers in the State of Vermont."[45] Thus, while I find Mr. Tucker's concern for the

---

42. Prehearing Conference Memorandum at 2.

43. Tucker Reply at 2.

44. The Board observes a lenient process for filing and reviewing consumer complaints. *See, e.g.*, Board Rule 2.302 (the Board "may in its discretion treat any written communication to it concerning a matter within its jurisdiction to be a claim for relief."); Board Rule 2.106 ("These rules shall be liberally construed to secure the just and timely determination of all issues presented to the Board."); Board Rule 2.212 ("In any proceeding, the Board may . . . direct the parties to appear before it for a conference to consider . . . the simplification of the issues . . ."). Consequently, there are instances — as in this case — where several interactions may be needed before the gist of a consumer's claim emerges with sufficient clarity to determine matters such as justiciability or "a probability of a violation of tariffs, statutes, rules or other orders of the Board . . . . " Board Rule 2.304.

45. *Letter of Mark Tucker to Judith C. Whitney*, Deputy Clerk of the Board, dated January 19, 2011 at 1.

welfare of Vermont consumers at large to be commendable, the fact remains that he is only one individual consumer. As such, he lacks standing as a matter of law to pursue a declaratory ruling from the Board "on the validity" of the Liquidated Damages Clause of the INpulse Plan.[46] By statute, only "a company or five or more individuals" are permitted to "attack utility practices" in regard to their general applicability. Given that the INpulse Plan represents Verizon Wireless' standard offer of terms and conditions to the public for prepaid wireless service, and given Mr. Tucker's stated purpose of helping "other consumers" as opposed to only seeking redress for himself, Mr. Tucker understandably did not — and cannot — plead any allegations which, if proven to be true, would show that he is one of fewer than five individuals affected by the alleged unfairness of the Liquidated Damages Clause. Assuming this contractual provision were ultimately found to be unreasonable pursuant to § 218 and § 219, all Verizon Wireless customers taking service under the INpulse Plan would be "so affected," as opposed to only Mr. Tucker or fewer than five individuals.

Because the nature of Mr. Tucker's claim forecloses him from pleading any allegations as an individual consumer that could satisfy the standing requirements of 30 V.S.A. § 208, I am compelled to conclude that Mr. Tucker's complaint must be dismissed because it is not justiciable by the Board.[47] Consequently, the arguments advanced by Verizon Wireless for dismissal pursuant to V.R.C.P. 12(b)(1) and 12 (b)(6) are moot and require no further consideration.

C. CONCLUSION

For the reasons discussed herein, I have concluded that Mr. Tucker's complaint against Verizon Wireless is not justiciable because Mr. Tucker has failed to plead any allegations that could satisfy the standing requirements of 30 V.S.A. § 208. Therefore, I recommend that the Board dismiss Mr. Tucker's complaint for lack of standing. In making this recommendation, I

---

46. *In re Vermont Public Power Supply Authority*, 140 Vt. 424, 432, 440 A.2d 140, 1443 (1981)(Section 208 "allows a single company or five individuals to attack utility practices.")

47. See *Trybulski et al. v. Bellows Falls Hydro-Electric Corporation*, 112 Vt. 1, 7, 20 A.2d 117, 120 (The Board is "a body exercising special and statutory powers not according to the course of the common law, as to which nothing will be presumed in favor of its jurisdiction. . . . It has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted . . .")(internal citations omitted).

am mindful of the Department's point that dismissal of this complaint does not leave Mr. Tucker without a remedy: to the extent that this dispute rests on a claim of false advertising by Verizon Wireless, Mr. Tucker may seek legal recourse under the state Unfair Trade Practices statute.[48]

Should the Board adopt my recommendation to dismiss Mr. Tucker's complaint, I further recommend that the Board close this docket. At this time, I perceive no independent need for the Board to investigate the terms and conditions of the INpulse Plan pursuant to 30 V.S.A. §209(a)(3). For one, the Board has no record of any other complaints from consumers with similar concerns about the reasonableness of the contractual terms of the INpulse Plan or other prepaid CMRS service in Vermont.[49] For another, to date, neither the Department nor the Vermont Attorney General's Office have responded to Mr. Tucker's arguments by calling for an investigation into the state of competition in Vermont's CMRS market or petitioning for augmented consumer protections. This suggests that, for the time being, Board Rule 7.502(A)(1)-(2) continues to provide an appropriate level of regulatory supervision in Vermont for CMRS providers such as Verizon Wireless.

Dated at Montpelier, Vermont, this 26th day of August, 2011.

s/ June E. Tierney
June E. Tierney, Esq.
Hearing Officer

48. I further note that, based on documents filed by Mr. Tucker after the prehearing conference in this case, it appears that further recourse remains available to him at the Federal Communications Commission, which has not yet conclusively resolved Mr. Tucker's formal complaint concerning a "deceptive or unlawful advertising or marketing" claim that he originally filed against Verizon Wireless in July of 2010 stemming from the same course of dealings at issue in this Docket.

49. At least in the case of the Inpulse Plan, the absence of such complaints may simply reflect that these CMRS customers generally sign up for service with the understanding that the contractual one-year term for drawing down their prepaid account balances represents a time limit on how long Verizon Wireless is obliged to make its system available for their use "on demand."

II. BOARD DISCUSSION

While we agree with the conclusion and adopt the recommendations of the Hearing Officer in this matter, Mr. Tucker's complaint does prompt us to consider whether Verizon Wireless might have drafted the Liquidated Damages Clause so as to have a less burdensome impact on INpulse Plan customers if there were more robust competition in Vermont's CMRS market. For today, Mr. Tucker's case remains the Board's sole known instance of a consumer complaint that calls into question whether the advertised "pay when you use it" nature of the INpulse Plan in fact is accurate and reasonable. In due course, if we receive more complaints of this type, then it may become necessary to revisit our policy determination in Rule 7.502 that competition in the relevant markets is sufficient to protect Vermont's CMRS customers from unjust and unreasonable terms and conditions in their service plans. We will continue to monitor this regulatory issue with the example of Mr. Tucker's complaint in mind.

III. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Service Board of the State of Vermont that:

1. The conclusions and recommendations of the Hearing Officer are adopted.

2. The complaint of Mark Tucker is dismissed pursuant to V.R.C.P. 12(h)(3).

3. This docket shall be closed.

Dated at Montpelier, Vermont, this 26th day of August, 2011.

s/ James Volz	)	
	)	PUBLIC SERVICE
	)	
s/ David C. Coen	)	BOARD
	)	
	)	OF VERMONT
s/ John D. Burke	)	

OFFICE OF THE CLERK

FILED: August 26, 2011

ATTEST: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.